IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.443 OF 2006

IN

ARBITRATION PETITION NO.242 OF 2005

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Angerlehner-Michel Construction
Pvt.Ltd. ...Petitioner

v/s.

M/s.Srimauli Builders & Anr. ...Respondents

...

Mr.Virag Tulzapurakar i/b Munir Merchant for the Petitioner.

Mr.B.B.Saraf i/b M/s.Kartikeya & Associates for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 1ST MARCH,2006

P.C.:

1. This Notice of Motion has been taken out by the Respondent No.1 in Arbitration Petition No.242 of 2005 for setting aside the order dated 18th July, 2005 passed in Arbitration Petition No.242 of 2005.

2. It appears that according to the Petitioner in arbitration proceedings certain amounts were recoverable by the original Petitioner from the Respondent No.1. Therefore, a petition was taken out, which was Arbitration Petition No.66 of 2005. Notices of that petition were served on the Respondent No.1 in that petition. The Respondent No.1 did not appear. The Court , therefore, by order dated 2nd February, 2005 granted that petition in terms of prayer clauses (a) and (b), excluding bracketed portion. Prayer clauses (a) and (b) excluding bracketed portion reads as under:-

(a) that pending commencement and culmination of arbitration proceedings and the making and implementation of the Award/s therein, in relation to the said Subcontract Agreements referred to in the Petition, this Hon'ble Court be pleased to issue an order of injunction restraining the Respondent, either by itself or through any agents, servants and/or assigns or otherwise howsoever from in any manner (i) entering into with any other party any contract in respect of the work under the said Subcontract Agreements; (ii) dealing with, taking possession of, disposing of, encumbering, handing over possession of or using and/or creating any third party rights or interest in respect of the materials and other things lying at the site; including those specified in Exhibit G hereto.

(b) that pending commencement and culmination of arbitration proceedings and the making and implementation of the

> Award/s therein, this Hon'ble Court be pleased to order the Respondent to secure the mount of Rs.2,02,73,450/- (Rupees Two Crores Two Lacs Seventy Three Thousand Four Hundred and Fifty Only) being the amount due and payable by the Respondent to the Petitioner partly as on 15th October, 2004 and partly on the 15th of November as per the Particulars of Claim, being Exhibit F hereto by deposit of the said amount of Rs.2,02,73,450/- (Rupees Two Crores Two Lacs Seventy Three Thousand Four Hundred and Fifty Only)

The Court by that order also directed the Respondent to make the deposit within a period of three weeks. It appears that nothing was done in compliance with the order. Therefore, Arbitration Petition No.242 of 2005 was taken out. In this Petition, apart from Respondent No.1, one more party Bangalore Water Supply And Sewerage Board was added as Respondent No.2. Both the Respondents were served in the petition. But they again did not care to appear. Therefore, by order dated 18th July, 2005

Arbitration Petition No.242 of 2005 was granted in terms of prayer clauses (a) and (b) of that petition. The court also granted the petition in terms of prayer clause (c) subject to certain modification, as also in terms of prayer clause (e) and d(iii). Present Notice of Motion has been taken out by the original Respondent No.1 for setting aside the order dated 18th July, 2005. In the affidavit filed in support of the motion, the Respondent No.1 has given various reasons and pointed out various problems that the Respondent No.1 is facing to explain as to why he could not appear before the Court when the order dated 18th July, 2005 was made. It may be pointed out here that pursuant to the order dated 18th July, 2005 the Respondent No.2 has deposited an amount in excess of Rs.2 crores in this court.

3. I have heard the learned Counsel appearing for the original Petitioner. The reasons that have been given by the Respondent No.1 for not appearing before the court when the order dated 18th July, 2005 was passed can by no stretch of imagination be accepted as genuine reasons or sufficient cause by themselves. But the fact remains that the order

dated 18th July, 2005 has drastic consequence in as much as as the amount is required to be deposited in this court to which the Respondent No.1 was otherwise entitled even before the claim of the Petitioner is adjudicated by the arbitrator and the order dated 18th July, 2005 is an exparte order. The conduct of the Respondents of not appearing before the court results in causing prejudice to the interest of the Petitioner. However, in my opinion, the prejudice that is likely to be caused to the interest of the original Petitioner is capable of being mitigated.

4. In my opinion, considering the pros and cons of the matter, an opportunity of being heard can be given to the Respondent No.1. The Respondent No.1 has agreed to pay substantial costs to the Petitioner. In this circumstances, therefore, in my opinion, following order would meet the ends of justice.

O R D E R

(i) The order dated 18th July, 2005 passed in Arbitration Petition No.242 of 2005 is set aside

only as against the Respondent No.1. The order dated 18th July, 2005 shall continue to operate as final order as against the Respondent No.2.

(ii) The relief granted in favour of the Petitioner by order dated 18th July, 2005 shall continue to operate during the pendency of Arbitration Petition No.242 of 2005 as interim relief. The original Respondent No.1 shall pay to the original Petitioner as and by way of costs of this motion an amount of Rs.25,000/- within a period of one week from today.

(iii) Failure of the Respondent No.1 to pay costs during the aforesaid period will result in dismissal this Notice of Motion.

(iv) In this Notice of Motion a prayer is made for setting aside the order dated 2nd February, 2005 passed in Arbitration Petition No.66 of 2005, but as this Notice of Motion has not been taken out in that petition, the request for setting aside the order dated 2nd February, 2005 cannot be considered in this Notice of Motion. That prayer is, therefore, permitted to be withdrawn with liberty to take out fresh Notice of Motion for the same, if so advised.

(v) In case the amount of costs is paid, the Arbitration Petition No.242 of 2005 be placed before the court for hearing in due course.

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